No. 619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

GENERAL MOTORS CORPORATION, GENERAL MOTORS SALES CORPORATION and GENERAL MOTORS ACCEPTANCE CORPORATION,

Petitioners,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

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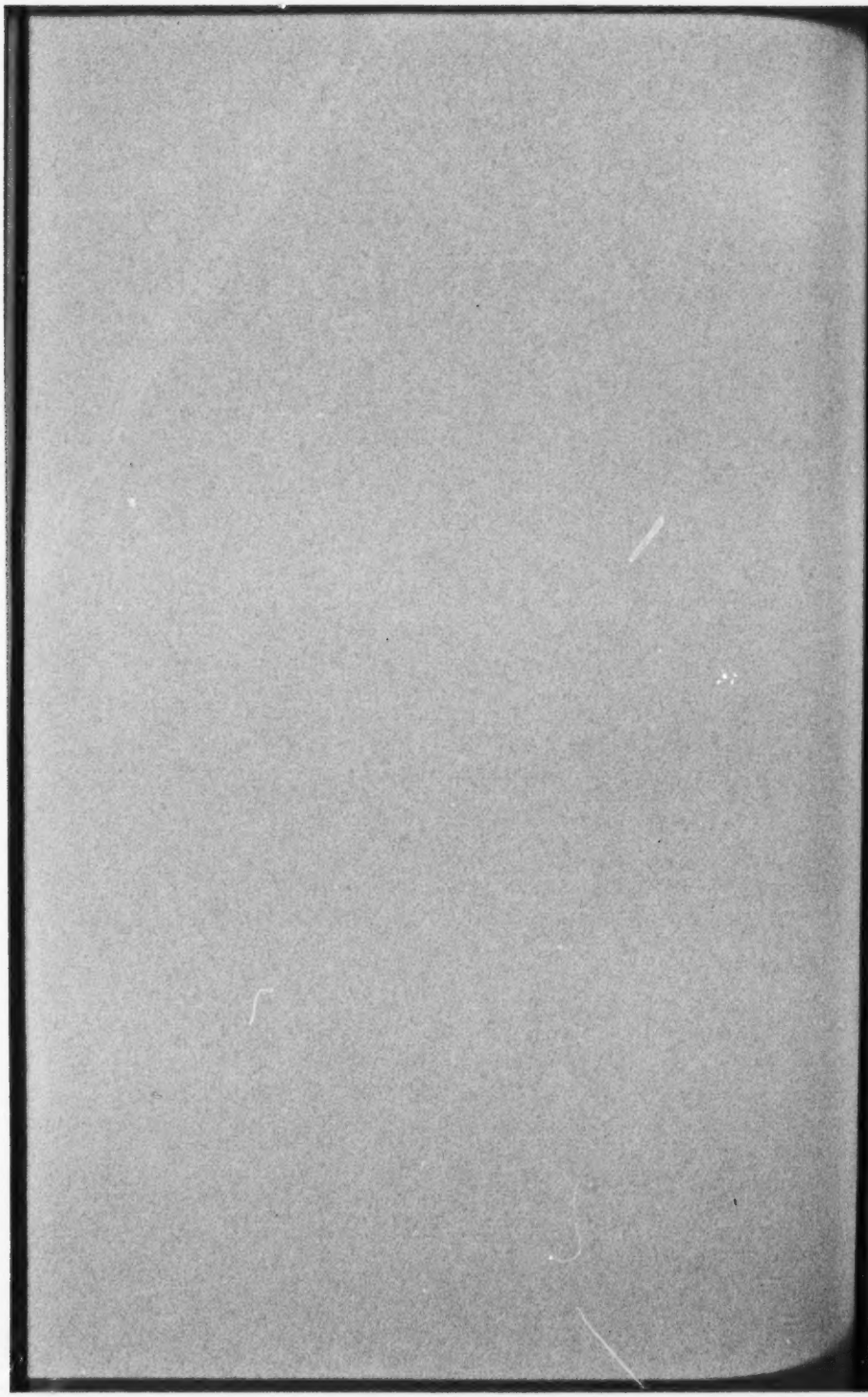
THE COURT PRESS, N. Y. C.



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Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

JOHN THOMAS SMITH, on behalf of General Motors Corporation, General Motors Sales Corporation and General Motors Acceptance Corporation, prays that a Writ of Certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit entered in this cause on September 13, 1940, affirming an order of the Federal Trade Commission requiring the Petitioners to cease and desist from a certain unfair method of competition.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 747) is reported in 114 F. (2d) 33.

JURISDICTION.

The decree of the Circuit Court of Appeals for the Second Circuit was entered September 13, 1940 (R.

757). The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Sec. 5 of the Federal Trade Commission Act, as amended, U. S. C. Title 15, Sec. 45.

Questions Presented.

1. Does the power of the Federal Trade Commission to regulate unfair methods of competition in commerce extend to advertising of a corporation not engaged in commerce, by reason of the fact that its capital stock is owned by another corporation engaged in commerce in a different activity.

2. Does the Federal Trade Commission's power of regulation for the protection of the unwary, trusting or ignorant against statements which are false extend to statements which are true as well as reasonably informative.

Statute Involved.

The statute involved is the Federal Trade Commission Act, enacted September 26, 1914, c. 311, 38 Stat. 717, U. S. C. Title 15.[1] The pertinent provisions of the Act are:

> "Sec. 4. The words defined in this section shall have the following meaning when found in this act, to wit:
>
> " 'Commerce' means commerce among the sev-

[1] This proceeding was instituted by the Commission before the Act was amended March 21, 1938, c. 49, 52 Stat. 111, U. S. C. Supp. v., Title 15, Secs. 41 *et seq.* The amendments are not pertinent to the questions here presented.

eral States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

* * * * * * * *

"Sec. 5(a) Unfair methods of competition in commerce are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce."

Statement.

(For convenience, in referring to the Petitioners, the name of General Motors Acceptance Corporation will be abbreviated to "GMAC", and General Motors Corporation will be referred to as "General Motors".)

1. *Jurisdiction.* GMAC is a New York corporation organized in 1919 under the Investment Companies sections of the New York Banking Law. It finances retail instalment sales by dealers in products of General Motors manufacture by purchasing from them, at a discount, the instalment sale contracts acquired as a result of sales to retail buyers on the instalment plan (R. 177). This activity is conducted at GMAC branch offices in nearly all the states. Contracts are purchased at each office from such General Motors dealers as elect to do business with it

under the GMAC finance plan which is issued to dealers who do or contemplate doing business with GMAC. By its purchase of executed contracts from the dealer, GMAC becomes the owner of the retail buyer's obligation for the balance of the time price remaining to be paid. Its relations with the retail buyers do not extend beyond those pertaining to the collection of instalments payable under the contracts or the enforcement of rights in the event of default. In this connection, the Federal Trade Commission found that (R. 21, 22):

> "Its credit facilities are made available to retail purchasers by furnishing a ready means whereby the retail dealer may dispose of the instalment contracts given him by retail purchasers. By this process the retail purchaser may contract to buy a car manufactured by General Motors on a deferred payment basis. The dealer in turn is at liberty to assign this contract to GMAC, if acceptable to that company, and receives the approximate value therefor, whereupon GMAC collects the monthly installments from the retail purchaser as they become due. GMAC functions exclusively in connection with sales negotiated by authorized dealers in cars manufactured by General Motors except as to used cars of other makes taken by those dealers in trade."

Concerning finance activities on the part of one of GMAC's competitors (R. 113), this Court has said in *Hemphill* v. *Orloff*, 277 U. S. 537:

> "* * * Such business is not interstate commerce. *Nathan* v. *Louisiana*, 8 How. 73; *Paul* v. *Virginia*, 8 Wall. 168; *Hatch* v. *Reardon*, 204

U. S. 152, 162; *Blumenstock Bros.* v. *Curtis Pub. Co.*, 252 U. S. 436, 443."[1]

Accordingly, GMAC challenged the Federal Trade Commission's jurisdiction and power to regulate its activities and, specifically, the advertising practice which provoked this proceeding (R. 15).

The Federal Trade Commission, consistent with the theory of its case, conceded before the Circuit Court of Appeals, and that Court recognized (R. 756) that, considered by itself, GMAC was not engaged in commerce so as to subject it to the Commission's jurisdiction.

The claim of jurisdiction on the part of the Federal Trade Commission over GMAC stems from the fact that its capital stock is owned by General Motors, which caused it to be organized as a finance company (R. 21). General Motors, a Delaware corporation since 1916, is engaged in the business of manufacturing automobiles, as well as other products. It sells the products it manufactures to General Motors Sales Corporation, whose stock it owns and GM Sales ships and sells the products manufactured by General Motors at wholesale to retail dealers in those products in the various states (R. 56, 59). The dealers then sell them locally to the retail buyers (R. 22, 24).

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[1] Other activities were held similarly not to constitute interstate commerce, in *Ware & Leland* v. *Mobile County*, 209 U. S. 405 (Brokers taking orders and transmitting them to other states for the purchase and sale of cotton); *U. S. Fidelity & Guar. Co.* v. *Kentucky*, 231 U. S. 394 (Credit information bureau and service across state boundaries); *Hopkins* v. *U. S.*, 171 U. S. 578 (Stockyard cattle brokers as agents on commission, buying and selling cattle and making advances on the security of the cattle consigned to them); *Fed. Baseball Club of Baltimore, Inc.* v. *National League of Professional Baseball Clubs, et al.*, 259 U. S. 200 (Professional Baseball); *Standard Home Co.* v. *Davis, State Bank Com'r, et al.*, 217 Fed. 904 (Investment Company).

Because, by acquiring and handling instalment sale contracts purchased from General Motors dealers, GMAC is associated with retail sales by General Motors dealers, GMAC's activities were considered as part of a unified plan of business conducted by General Motors and as falling into the flow of commerce represented by the progress of General Motors products from manufacture to the local dealers for resale. This was on the ground that, while GMAC was "organized primarily as a finance company", the effect as well as the purpose of the GMAC advertising complained of was to further and promote the sale of cars of General Motors manufacture to the purchasing public. Those facts constitute the predicate of the Commission's position, asserted in purported findings of fact as well as in its complaint, that GMAC is the subsidiary medium through which General Motors conducts the finance activities which promote the sale of products which it manufactures (R. 3, 20, 31).

Sustaining the Commission's position, the Circuit Court of Appeals held that GMAC was engaged in interstate commerce because it was wholly owned by General Motors and was its agent in a unified plan of selling and financing cars shipped in interstate commerce (R. 756).

This results in a category of commerce compounded of stock ownership of the corporation whose activities are in question by a corporation engaged in commerce, and of the indirect connection of the subsidiary, as an incidence of the pursuit of its activities, with the manufacturing and wholesale distribution enterprise. Thus, what had not been commerce, becomes commerce by obliteration of all functional differences and by joining two different activities, not on the basis that the GMAC finance business affects the commerce in

which the manufacturer is engaged any more than the business of any other finance company would, but rather because their stock relationship creates an economic unity of enterprise which reduces GMAC to an agent under a unified plan of selling and financing.

The authority for the principle stated by the Circuit Court of Appeals was said to be found in this Court's decision in *Federal Trade Commission* v. *Standard Education Society, et al.*, 302 U. S. 112, 120, but it is of the essence of this petition that this Court there dealt with no principle applicable to the situation here under discussion. The question of the necessity or propriety in an order issued by the Commission of including persons who are active in the management of the corporation against whose unfair practices the order is issued, presupposes that the corporation charged with the unfair practices is in commerce and subject to the Commission's jurisdiction. It would be pertinent only if GMAC were in commerce and if it were a question of including General Motors in the Federal Trade Commission order on the ground that, contrary to the facts in this case, it participated in the management of GMAC, in addition to its ownership of GMAC stock. It has no bearing whatever on the question whether a corporation which is not in commerce is subject to the jurisdiction of the Federal Trade Commission by reason of its stock relationship with a corporation which is in commerce. Substantially the same observations applied to the decision in *National Harness Mfrs'. Ass'n* v. *Fed. Trade Com.*, 268 Fed. 705, 709 (C. C. A. 6), also mentioned by the Circuit Court of Appeals.

General Motors was not itself engaged in the finance

business, nor did General Motors and GMAC have any officers in common, although they had some directors in common (R. 741, 742). None of the advertising against which the Commission proceeded, as an unfair method of competition, was done by General Motors. The only reason for including General Motors in the proceeding was to make its ownership of the GMAC capital stock serve as the unifying medium, by which the Federal Trade Commission purports to borrow from the commerce in which General Motors is engaged, to convert GMAC's finance business into commerce.

2. *Unfair Advertising Practice.* The GMAC practice against which the Federal Trade Commission proceeded as an unfair method of competition in commerce was a series of advertisements published by GMAC in national periodicals and newspapers of general circulation. It announced with a detailed explanation a ~~reduced finance cost~~ reduction in the finance cost of approximately 25% under a 6% Plan available with respect to retail instalment purchases. Besides the reduction in cost, the plan enabled the instalment buyer to make his own calculation of the finance charge that would be added by a dealer as part of the time price if the purchaser made an instalment purchase from a dealer where the GMAC finance plan was available. Theretofore the finance charge had been concealed from the public, lumped with other charges. The Commission charged the advertisements with the capacity and tendency to mislead and deceive the purchasing public into the erroneous belief that the 6% finance cost, as advertised, contemplated and amounted to a simple interest charge of 6% per annum on the unpaid balance of the total time price.

The initial advertisement was conceded to be similar to other and subsequent GMAC advertisements and to give an extended explanation of the 6% Plan (R. 25, 26, 749, 750).

Immediately following the reference to the 6% Plan, the advertisement features in prominent and distinctive display a statement illustrating the computation process involved as a simple matter of (A) taking the unpaid balance, (B) adding the cost of insurance and (C) multiplying by 6%, resulting in the *whole* financing cost, with no extras, no service fees and no other charges (R. 749). This is followed in later text, by the statement that the financing cost of 6% "is not 6% interest, but simply a convenient multiplier anyone can use and understand" (R. 750).

That those advertisements spoke the truth is not in question; they stated what the 6% cost was and what it was not. The Circuit Court of Appeals, however, rejected GMAC's contention that, having painstakingly and truthfully told the public that it was a simple arithmetical process of multiplying the amount of unpaid balance by 6% and *that it was not interest*, GMAC had discharged its obligations with respect to fair representation and was not accountable for any impression contrary to and not warranted by the language of the statements contained in the advertisements. In effect the Circuit Court of Appeals held GMAC to the same responsibility as falls upon one who makes a *false* statement which deceives or misleads only the trusting or unwary (R. 754).

Specification of Errors to be Urged.

The Circuit Court of Appeals erred in holding (1) that GMAC was engaged in commerce within the

meaning of the Federal Trade Commission Act, and (2) that GMAC's advertising constituted an unfair method of competition subject to an order to cease and desist under the Federal Trade Commission Act.

Reasons for Granting the Writ.

1. Each of the questions presented is one of public importance which should be decided by this Court.

As to the first, the decision below results in a new concept of interstate commerce for which there is no authority. A question involving an extension of the Federal Trade Commission's jurisdiction to exercise its regulatory power beyond the limits of interstate commerce as previously established warrants an authoritative decision by this Court. It is important in its nature as well as its scope.

It is submitted that it is of no less public importance that the decision below makes for a distinction which results in one corporation such as GMAC being in commerce subject to the jurisdiction of the Federal Trade Commission, and a competitor finance company not. The distinction is based solely on the fact that the capital stock of one of the two corporations competitively engaged in the same business is owned by the manufacturer in commerce and the stock of the other is not, notwithstanding that both may be in all other respects similarly connected with the manufacturer's business to the extent they purchase instalment sale contracts from dealers in the manufacturer's products, and thereby may have some economic influence on the wholesale business. It is a matter of public concern whether a determination of the question of commerce sufficient to give jurisdic-

tion to the Commission shall be permitted to remain on such a basis.

If the decision below on the second question presented is correct, it means an extension of the scope of the Federal Trade Commission's regulatory power. It departs from established standards for determining whether a statement such as an advertisement is an unfair practice by reducing the question to the single test of the possibility of misleading the ignorant, careless or trusting, without regard to truth or falsity of the statemem. This goes farther, in the direction of protecting the ignorant or the unwary or those who can but will not read or understand, than this Court did in *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 112.

In that case, it was against a *false* statement that this Court protected the trusting and ignorant. Recognizing that a false statement may be misleading, no matter how obviously false it is, this Court refused to allow an escape from responsibility for a statement which, being false, is deceiving, except to those who are capable of seeing through it.

That is not a principle standing for protection against a *truthful* statement which cannot be misleading except as a result of ignorance, indifference or perversion of the meaning of the statement. It is a question worthy of this Court's intervention, whether or not protection in the name and behalf of the ignorant or careless shall go as far as to permit the Federal Trade Commission to exercise its power with respect to a statement which is truthful, informative and comprehensible, and to make the measure of an unfair method no longer the falsity of an advertising statement or similar practice.

2. The decision below is inconsistent, where not in conflict, with other decisions involving the question of interstate commerce.

It purports to treat as interstate commerce that which functionally is not commerce by transforming it into an instrumentality in the flow of the commerce represented by the General Motors manufacturing business or distribution to dealers at wholesale.

Even if an activity, such as financing, which is not commerce could be converted into commerce subject to the Federal Trade Commission's jurisdiction by reason of some relationship to an activity in interstate commerce, the attempt in this instance to push a finance business into the flow or current of commerce runs counter to the decisions on that phase of the commerce question. The decisions declare and emphasize the necessity that there be a close, intimate and direct relationship with and effect on the interstate commerce, and, generally speaking, they deal with situations where the question relates to the effect of an activity which, separately considered, is not interstate commerce because it is local or intrastate, rather than because it is not commerce in a functional sense. *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U. S. 495; *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453; *Burco, Inc.* v. *Whitworth,* 81 F. (2d) 721, 737 (C. C. A. 4); *Chamber of Commerce* v. *Federal Trade Commission,* 13 F. (2d) 673, 684 (C. C. A. 8); *Carter* v. *Carter Coal Co.,* 298 U. S. 238; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1.

According to the principle in those decisions, an indirect or unobstructive relationship or the mere fact that it has the capacity of aiding or assisting the activity in commerce are not enough to bring an

activity within the reach of Federal power as interstate commerce; something more is required to bring about the necessary effect than that it is allied in some manner, whether by stock relationship or other business interest, either with the unified plan of the General Motors business or industry in general. It is inconsistent with those decisions to consider as interstate commerce a business which, apart from its place in the General Motors scheme of things or in the economic scene, does not affect the interstate commerce represented by the General Motors activity in manufacturing or wholesale distribution to dealers, since it functions only in relation to the instalment sale contracts acquired by the local retail dealers, not only after the products have come to rest with the dealers, but also after the dealers' retail sales locally.

The decision below proves further to be inconsistent with other decisions if the test applied is the assistance the finance business is deemed to render the wholesale business in promoting the ultimate retail sale of the manufacturer's products. If General Motors itself conducted the same finance business along with and as an aid to its regular activities which constitute commerce, then, by the principle that "the nature of the act, not the person of the actor" is decisive and that the character of the business of a single corporation conducting several types of activities must be determined by the particular transactions involved, it would retain its character and would not be transformed into commerce even though managed and living directly under the same roof as the other type of business. *Puget Sound Co.* v. *Tax Commission,* 302 U. S. 90; *Foster & Kleiser Co.*

v. *Special Site Sign Co.,* 85 F. (2d) 742, cert. denied 299 U. S. 613. In a reverse situation, where the proposition involved the status of the holding company, as part of the question whether a holding company could resist federal power to forbid the use of mails or the facilities of interstate commerce under the Public Utility Act, this Court pointed out that it is "the substance of what they do, and not the form in which they clothe their transactions, which must afford the test", so that conducting "such transactions through the instrumentality of subsidiaries cannot avail to remove them from the reach of the federal power". (*Electric Bond & Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, 440).

By employing a principle inconsistent with the one just referred to, the decision below produces the anomalous result that GMAC is held to be in commerce as a consequence of considering its business as a promotional agency under the General Motors unified plan of selling and financing, although the finance activity would not be commerce if conducted by General Motors itself. In other words, because the relationship between the two corporations is sought to be used with the limited purpose of affecting the finance business with the attributes of commerce, it becomes unnecessary to give particular consideration to the principle of keeping clear the distinction between two corporations, each "amenable as such to governmental authority" where there is no question "of the abuse of intercorporate relations, or of domination or control affecting the integrity of the direction of the affairs". *Smith* v. *Illinois Bell Telephone Co.,* 282 U. S. 133, 152.

Conclusion.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit should be granted.

New York, N. Y., December 10, 1940.

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